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IN THE SUPREME COURT OF ALABAMA
April 27, 2001

1000925

Ex parte Michael Lewis Gagliardi. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Michael Lewis Gagliardi v. State of Alabama) (Jefferson Dis. Ct. No.: DC-91-842.60) (Low'r App. Ct. No.: CR-99-2076)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted. IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied. NO OPINION.

COSTS TAXED TO THE PETITIONER

STUART, J. - Moore, C.J. and See, Brown, and Harwood, JJ., concur.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

MEMORANDUM

CR-99-2076 Jefferson District Court No. DC-91-842.60

Michael Lewis Gagliardi v. State of Alabama

LONG, Presiding Judge.

AFFIRMED. On March 15, 1991, the appellant pled guilty, in the Jefferson District Court, to second-degree robbery. The district court sentenced him to serve fifteen years in prison, but split the sentence and ordered him to serve two years in prison followed by two years on probation. The appellant did not appeal his conviction. However, on December 30, 1999, he filed a Rule 32 petition, challenging his conviction. After the State responded, the district court denied the petition. This appeal followed.

The appellant argues that his conviction is void and that the district court did not have jurisdiction to accept his guilty plea in this case. He bases these arguments on the contention that the district attorney did not file an information or an indictment in this case charging him with a crime.[1] In re

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[1] The appellant also argues that "[t]he District Court Clerk has a responsibility to maintain criminal case files forever." (Appellant's brief at p. 9.) In support of this contention, he cites Rule 28, Ala. R. Crim. P., which provides: "All records and (continued...)

sponding to the petition, the State submitted an affidavit from the Jefferson County District Attorney in which the District Attorney stated:

> "I, David Barber, being over the age of 21 years, and of sound mind, do affirm the facts stated herein:
>
> "1. That I have been the duly elected District Attorney since 1984 for the Tenth Judicial Circuit. In March of 1991, I was the duly elected District Attorney for said Circuit.
>
> "2. My office makes offers on felony cases and enters into agreements for resolutions of those cases in District Court. It is our policy that the Deputy District Attorney (DDA) in the District court, where the charge is pending, has a legal secretary type up an Information; when notified by the Court of a defendant's intent to plead guilty. The legal secretary types up two (2) copies of the Information. The DDA signs my name in the appropriate blank and then signs their own in the affidavit blank. Our notary witnesses this and affixes his/her seal. On the plea day, the DDA

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[1] (...continued)
evidence of the proceedings must be retained according to the records retention schedule approved by the Alabama Supreme Court." Although he attaches a copy of a records retention schedule to his brief to this court, he did not include a copy of that schedule in his petition or otherwise present it to the district court. Therefore, he did not satisfy his burden of pleading and proving that the district court did not comply with the requirements of the relevant records retention schedule. See Rules 32.6(b) and 32.3, Ala. R. Crim. P.

presents the signed and notarized copy to the Court and the unsigned copy is retained in our file. This has been our policy since I have been the District Attorney for the Tenth Judicial Circuit.

"3. At my direction I had our office file of Mr. Michael Lewis Gagliardi searched. Among other things found we were three documents, of which copies have been attached (Barber Affidavit: Exhibits, A, B and C). Exhibit A is the Information for Michael Lewis Gagliardi in DC91-842. Exhibit A is consistent with an unsigned Information that is retained in our files when an Information plea is done. The only logical reason for this document to have been in our files, would be that an Information had been prepared for this case. Exhibit B is a copy of the original 'Court's Notice to District Attorney of Defendant's Desire to Plead Guilty' that was found in our files. It is signed by the late Judge Jack Montgomery, the Honorable Ron Harris (Counsel for the Defendant), and the Defendant Michael Lewis Gagliardi. This document is the instrument that the Court serves notice upon our office to prepare an Information. It is the same document that the DDA gives to the legal secretary to have the Information typed. Exhibit C is a copy of the original 'Defendant's Intent to Plea guilty Without an Indictment.' Again, it is signed by the defendant and his counsel. The original of this form should be in the Clerk's file.

"4. I am not aware of any cases, in my fourteen (14) years as a District Attorney, where a felony plea was taken in District Court without my office filing an Information with the Court. This practice is in-

structed to every DDA that is assigned in District Court and to every legal secretary that works in our District Court office.

"I know of no reason that an unsigned copy of an Information would be in our file (when a guilty plea on a felony was taken in District Court) unless a signed copy of the Information had been presented to the District Court Judge taking the plea."

(C.R. 31-32.) After reviewing the petition, the State's response, the district court record, and the transcript of the guilty plea colloquy, the district court found as follows:

"This cause coming before the Court on Defendant's Petition for Relief Under Rule 32, Alabama Rules of Criminal Procedure and the State of Alabama's responses thereto, argument presented and briefs received from both parties, the Court finds as follows:

"1. The issue presented in this case is one of jurisdiction due to the record of conviction in DC 91-842 failing to contain a properly certified information for a grand jury indictment.

"2. That both the State of Alabama and the Defendant agree that a certified 'information' is not presently in defendant's record. The State argues that said information was referred to in several other related documents made a part of Defendant's plea and also that an unsigned information is, in fact, in the District Attorney's file indicating that at the time of the plea, an information was, in fact, in Defendant's

file and that is sufficient to satisfy the question of jurisdiction and meets the requirement of The Trial Courts Record Retention Schedule. The Defendant argues that the requirement is specific and cannot be met indirectly by reference to other documents and that a certified information must actually be permanently retained in Defendant's record.

"3. The Court reviewed the record of the colloquy between the Court and the Defendant when the plea of Defendant was taken and there is no direct reference by the Court concerning the certified information being in Defendant's file at the time the plea was taken, however, on page 4, line 7 of the plea record, the Court refers to the Explanation of Rights and Plea of Guilty form, the first line of which reads: 'under the information filed against you in this case by the District Attorney of this County, you are charged with the crime of Robbery 2nd degree which is a class B felony.' This form was signed by the Defendant, his attorney and the Judge.

"Additionally, the affidavit of David Barber, District Attorney for the Tenth Judicial Circuit of Alabama, specifically addresses the procedure for introducing an Information in all cases when guilty pleas are taken, namely, that at the time of the plea a signed, certified Information is introduced and placed in the court file and an unsigned copy is retained in the District Attorney's file. That policy was apparently followed in the case under consideration as the State has produced their unsigned copy of the Information.

"The Defendant, in his colloquy with the Court, and with counsel present, stated that he fully understood the charges against him and all constitutional rights to which he was entitled.

"Based upon the above findings and an entire review of the Defendant's file in this case as well as a review of the requirements of Rule 28 of the ARCP, The Trial Courts Record Retention Schedule and the applicable law, this Court determines that it is a question of fact to be decided by this Court as to whether or not a certified information existed at the time Defendant's plea was taken.

"This Court determines that the evidence, when considered in its entirety, supports a determination in favor of the State and against the Defendant and finds that it had jurisdiction to take Defendant's plea in case number DC 91-842, that it was a valid plea and should not be set aside because the information was not in Defendant's file more than 9 years after the plea of Defendant and that Defendant's Rule 32 petition is due to be and the same is denied."

(C.R. 12-14.) The record supports the circuit court's findings; therefore, we adopt them as part of this memorandum. Accordingly, we affirm the district court's judgment.

McMillan, Cobb, Baschab, and Fry, JJ., concur.

IN THE DISTRICT COURT, TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
CRIMINAL DIVISION

MICHAEL GAGLIARDI	)	
	)	
PETITIONER,	)	
	)	
VS.	)	
	)	
STATE OF ALABAMA	)	
	)	
RESPONDENTS.	)	CASE NO. DC 91-842.60

ORDER ON DEFENDANT'S RULE 32 PETITION

This cause coming before the Court on Defendant's Petition for Relief Under Rule 32, Alabama Rules of Criminal Procedure and the State of Alabama's response thereto, argument presented and briefs received from both parties, the Court finds as follows:

1. The issue presented in this case is one of jurisdiction due to the record of conviction in DC 91-842 failing to contain a properly certified information for a grand jury indictment.

2. That both the State of Alabama and the Defendant agree that a certified "information" is not presently in Defendant's record. The State argues that said information was referred to in several other related documents made a part of Defendant's plea and also that an unsigned information is, in

fact, in the District Attorney's file indicating that at the time of the plea, an information was, in fact, in Defendant's file and that is sufficient to satisfy the question of jurisdiction and meets the requirement of The Trial Courts Record Retention Schedule. The Defendant argues that the requirement is specific and cannot be met indirectly by reference to other documents and that a certified information must actually be permanently retained in Defendant's record.

3. The Court reviewed the record of the colloquy between the Court and the Defendant when the plea of Defendant was taken and there is no direct reference by the Court concerning the certified information being in Defendant's file at the time the plea was taken, however, on page 4, line 7 of the plea record, the Court refers to the Explanation of Rights and Plea of Guilty form, the first line of which reads: "under the information filed against you in this case by the District Attorney of this County, you are charged with the crime of Robbery 2nd degree which is a class B felony." This form was signed by the Defendant, his attorney and the Judge.

Additionally, the affidavit of David Barber, District Attorney for the Tenth Judicial Circuit of Alabama, specifically addresses the procedure for introducing an Information in all cases when guilty pleas are taken, namely, that at the time of the plea a signed, certified Information is introduced and placed in the court file and an unsigned copy is retained in the District Attorney's file. That policy was apparently followed in the case under consideration as the State has produced their unsigned copy of the Information.

The Defendant, in his colloquy with the Court, and with counsel present, stated that he fully understood the charges

against him and all constitutional rights to which he was entitled.

Based upon the above findings and an entire review of the Defendant's file in this case as well as a review of the requirements of Rule 28 of the ARCP, The Trial Courts Record Retention Schedule and the applicable law, this Court determines that it is a question of fact to be decided by this Court as to whether or not a certified information existed at the time Defendant's plea was taken.

This Court determines that the evidence, when considered in its entirety, supports a determination in favor of the State and against the Defendant and finds that it had jurisdiction to take Defendant's plea in case number DC 91-842, that it was a valid plea and should not be set aside because the Information was not in Defendant's file more than 9 years after the plea of Defendant and that Defendant's Rule 32 Petition is due to be and the same is denied.

DONE and ORDERED this the 19th day of April, 2000.

/s/
R. O. Hughes
District Judge

A copy of this order is to be sent to Defendant's Attorney of Record and to Deputy District Attorney Carl Randall for the State of Alabama.

/s/
R. O. Hughes
District Judge

State v. Michael Lewis Gagliardi

CR-98-0630

COURT OF CRIMINAL APPEALS OF ALABAMA

747 So. 2d 366; 1999 Ala. Crim. App. LEXIS 139

May 28, 1999, Released

SUBSEQUENT HISTORY:

Rehearing Denied July 9, 1999. Released for Publication January 21, 2000. As Corrected January 24, 2000.

PRIOR HISTORY:

Appeal from Jefferson Circuit Court. (CC-94-2959.60). Tommy Nail, TRIAL JUDGE.

DISPOSITION:

REMANDED WITH DIRECTIONS.*

COUNSEL:

For Appellant: Bill Pryor, atty. gen., and James B. Prude, asst. atty. gen.

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* Note from the reporter of decisions: On September 10, 1999, on return to remand, the Court of Criminal Appeals affirmed, without opinion.

For Appellee: Carranza Mothershed Pryor, Birmingham.

JUDGES:

FRY, JUDGE. Long, P.J., and McMillan, Cobb, and Baschab, JJ., concur.

OPINIONBY:

FRY

OPINION:

[*366] FRY, JUDGE

On January 5, 1996, Michael Gagliardi, was convicted of robbery in the first degree, a violation of § 13A-8-41, Ala. Code 1975. Gagliardi was sentenced pursuant to the Habitual Felony Offender Act to life imprisonment without parole. Gagliardi's conviction was affirmed on direct appeal. *Gagliardi v. State*, 695 So. 2d 206 (Ala. Cr. App. 1996). We take judicial notice of the record on direct appeal. On May 21, 1998, Gagliardi filed a Rule 32, Ala. R. Crim. P., petition attacking his 1996 robbery conviction. In his petition, Gagliardi claimed, among other things, that his trial counsel was ineffective for failing to object to the use of a 1991 felony conviction to enhance his sentence because, he claimed, the 1991 conviction was not valid. Specifically, he argued that his 1991 conviction was not valid because the conviction was obtained without an information. On July 2, 1998, the circuit court entered an order denying Gagliardi's Rule 32 petition.

Gagliardi filed a motion to reconsider the petition, realleging his claim that his trial counsel was ineffective for not challenging the validity of the 1991 felony conviction. The State filed a response. On December 18, 1998, the circuit court conducted a hearing to consider the merits of Gagliardi's claim. The circuit court determined that in 1991 Gagliardi had pleaded guilty by information in the District Court of Jefferson County to robbery in the second degree. *See* Rule 2.2(e), Ala. [*367] R.Crim.P. However, during the hearing the State was unable to produce the information from the 1991 conviction. At the conclusion of the hearing, the circuit court found, that because the State could not produce the information, the 1991 conviction was not valid. The circuit court further determined that because the 1991 conviction was not valid, the use of that conviction to enhance Gagliardi's 1996 sentence was improper. The circuit court then vacated Gagliardi's sentence for life imprisonment without parole for his conviction of robbery in the first degree and resentenced Gagliardi to life imprisonment. The State appealed.

Rule 32.1, Ala. R. Crim. P., provides that "any defendant convicted of a criminal offense may institute a proceeding in the court of original jurisdiction to secure appropriate relief." (Emphasis added.) Moreover, a petitioner cannot at a subsequent proceeding attack the validity of a prior conviction that was used only to enhance the sentence under the Habitual Felony Offender Act. *See James v. State*, 681 So. 2d 269 (Ala. Cr. App. 1996).

Gagliardi's Rule 32 petition is a collateral attack on the validity of his 1991 guilty plea conviction. Therefore, the petition should have been filed in the court of original jurisdiction -- the Jefferson District Court.

"'A court's lack of subject-matter jurisdiction is fundamental, cannot be waived, and may be raised at any time.' *McKinney v. State*, 549 So. 2d 166, 168 (Ala. Cr. App. 1989). *See* Rule 15.2(d), A.R.Cr.P. Moreover, it is incumbent upon appellate courts to consider lack of subject-matter jurisdiction ex mero motu. *Ex parte Smith*, 438 So. 2d 766 (Ala. 1983)." *Pittman v. State*, 621 So. 2d 351, 352 (Ala. Cr. App. 1992). *Cf. Harvey v. City of Oneonta*, 715 So. 2d 779 (Ala. 1998). Because the Jefferson Circuit Court was not the court of original jurisdiction for Gagliardi's 1991 guilty plea conviction, that court was without jurisdiction to determine the validity of the 1991 conviction. Therefore, its actions in setting aside Gagliardi's 1991 conviction are void. This case is remanded to the circuit court with directions to reinstate the original sentence of life imprisonment without parole.

If Gagliardi wishes to challenge the validity of his 1991 guilty-plea conviction, he should file a Rule 32 petition in the court of original jurisdiction, the Jefferson District Court. Once that court has made a determination on the validity of the 1991 conviction, he can challenge the use of the 1991 conviction to enhance his 1996 sentence.

For the reasons stated above, this case is remanded with directions to the circuit court for actions consistent with the directions set forth in this opinion. A return to remand to this court shall be made within 21 days of this opinion.

REMANDED WITH DIRECTIONS.

Long, P.J., and McMillan, Cobb, and Baschab, JJ., concur.

STATE OF ALABAMA

IN THE CIRCUIT COURT FOR THE COUNTY OF JEFFERSON

TENTH JUDICIAL CIRCUIT

CRIMINAL

CASE NO. CC 94-2959

STATE OF ALABAMA,

Plaintiff,

vs.

MICHEL LEWIS GAGLIARDI,

Defendant.

CAPTION

THE ABOVE-STYLED CAUSE came on to be heard before the Honorable J. Richmond Pearson, Judge, at the Criminal Justice Center, Birmingham, Alabama, on the 18th day of December, 1998, commencing at 10:55 A.M., before Judy L. Bresnan, Court Reporter and Commissioner.

APPEARANCES

FOR THE STATE:
Mr. Carl Randall

Deputy District Attorney
801 21st Street North
Birmingham, Alabama 35203

FOR THE DEFENDANT:
Mr. Carranza Pryor
Attorney at Law
2400 AmSouth/Harbert Plaza
1901 21st Street North
Birmingham, Alabama 35203

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PROCEEDINGS

* * * * * * * * * * * * * * * * *

THE COURT: For the record, my name is Carranza Pryor. The case is Michel Lewis Gagliardi versus the State of Alabama, case number CC 94-2959. This is a Rule 32 petition.

THE COURT: We've had prior hearings on this, have we not?

MR. PRYOR: You have, Your Honor.

THE COURT: Did y'all keep up with who the court reporter was? I don't know, but anyway, if you need it all. Go ahead.

MR. PRYOR: The issues after that first hearing before Your Honor were eliminated but for one and that was the petitioner's point that no information had been filed in a prior underlying conviction. This man had been convicted of first degree robbery in this court in 1996 and – –

THE COURT: In 1996?

MR. PRYOR: Yes, Your Honor.

THE COURT: First degree robbery?

MR. PRYOR: Yes.

THE COURT: Without an indictment you say?

MR. PRYOR: Without an infor – – your sentence was life without parole. The challenge is to one of the underlying convictions.

THE COURT: All right. That it was based on?

MR. PRYOR: Yes, Your Honor. This was a conviction or a plea before Judge Jack Montgomery in 1991 that we are challenging. It was a plea. He entered a plea of guilty, however we're concerned that no information was filed in that case.

THE COURT: I remember it now. The record doesn't show that an information was filed in that case?

MR. PRYOR: Correct, Your Honor.

THE COURT: All right. Mr. Randall.

MR. RANDALL: Your Honor, everything Mr. Pryor said is exactly correct to the extent that he went. The district court file was imaged sometime back, as you know the clerk's office does. They no longer have the file. They take pictures of it or whatever technology – –

THE COURT: But don't they – – wouldn't whatever, microfiche or whatever it is, shouldn't it reflect what happened?

MR. RANDALL: It should, Your Honor. However, for whatever reason, when they go back to unimage it or put it on paper or whatever technological term you want to use – –

THE COURT: They can't half read it?

MR. RANDALL: Well, no. There's no information in there. However, we did a search of the district attorney's files, and I had an affidavit done by Mr. Barber who was district attorney at that time and is, as you know, still district attorney over this circuit, and we found three documents of note. And we would like to enter those – –

THE COURT: Have you shown them to him?

MR. RANDALL: Yes, sir, I have, and also I've provided a copy.

THE COURT: Sure, sure. What do these documents – –

MR. RANDALL: Your Honor, two of these documents are filed in district court whenever a person wants to plead guilty and those would be specific to this case. The third document, Your Honor, is, as Mr. Barber tells you in his affidavit, that the way our office operates is when we get those documents from the court, we prepare an information. And the deputy district attorney in that district court will sign one and retain the other one in our files.

Your Honor, that would be the retained one and I guess the state's – –

THE COURT: Which one, the information here?

MR. RANDALL: Yes, sir. The little paper with the red tab on it.

THE COURT: All right.

MR. RANDALL: And what the state's contention is is that by showing you this document and the other two attached is that in fact an information was filed at the time, however it has been lost in the seven years since then.

We acknowledge that an information had to have been filed for Judge Montgomery to have jurisdiction over the case itself. However, the Court does not retain jurisdiction by means of such a document. It retains jurisdiction by means of the actual conviction. So I guess the state's argument is that – –

THE COURT: Well, wait a minute. How do you reach that that they retain -- – did you use the term retain?

MR. RANDALL: I did use the term retain.

THE COURT: By the actual conviction?

MR. RANDALL: By the conviction itself, yes, sir.

THE COURT: How can the court pull itself up by its own bootstrap?

MR. RANDALL: I'm sorry, Your Honor. I wasn't trying to make a bootstrap argument.

THE COURT: Well, you said that jurisdiction is gotten by the fact that the court entered a conviction.

MR. RANDALL: No. I was trying to say the court retains jurisdiction by entering the conviction. It got jurisdiction – –

THE COURT: That's the reason I asked you about the word retain. What do you mean retain?

MR. RANDALL: Meaning – – the state's argument is that if some document is lost out of that file five, ten or fifteen years later, it doesn't mean the conviction isn't good and it doesn't mean that it wasn't there at the time.

THE COURT: Oh, you're saying that this is still down there?

MR. RANDALL: What I'm saying is that document from the evidence we can show at least circumstantially was filed, however it's been lost by someone in a paper shuffling process.

THE COURT: Let me ask you this. Wouldn't that be an assumption?

MR. RANDALL: It's definitely my assertion. I mean and i – –

THE COURT: But what I'm saying, wouldn't it be incumbent upon the state to show that the law was complied with fully?

MR. RANDALL: I believe, Your Honor, that when I guess we're five or six years down the line that the fact that there is a valid conviction, I think that there's got to be some presumption that it was done correctly because – –

THE COURT: Well, see, when you say a valid conviction, that begs the question. You skipped over – – you could say when there is a conviction on record, but whether it's valid is what he's hollering about I gather.

MR. RANDALL: Yes, sir.

THE COURT: I gather.

MR. PRYOR: Yes, sir.

MR. RANDALL: That's exactly it. And I guess what the crux of this matter comes down to is that – –

THE COURT: I don't doubt that Mr. Barber did everything he was supposed to do, but wouldn't the case record speak for itself?

MR. RANDALL: Your Honor, what we're trying to say is that the record is no longer complete because of the ravages of time.

THE COURT: Do you have any case law that time can justify – –

MR. RANDALL: Your Honor, there is no case law I found on either side of that point.

THE COURT: I know but the law is clear – –

MR. RANDALL: Mr. Pryor may have – –
THE COURT: The law is clear that you have to justify holding somebody, don't you?

MR. RANDALL: Yes, sir, you do. And my understanding is – – the closest I've been able to come is that in using a prior conviction against somebody, the docket sheet itself can be sufficient proof of a valid conviction.

THE COURT: I don't doubt that the docket sheet, and I agree with you that the docket sheet itself is – – would speak for itself except that it doesn't speak for whether or not an information, if that is jurisdictional, whether that was ever there. Does the docket sheet say there was an information filed?

MR. RANDALL: The docket sheet does not have a specific entry, however it does say in part of the paperwork

based upon the information filed – – as charged by information filed by the district attorney. However, to be very fair, there is no – –

THE COURT: Information.

MR. RANDALL: Well, there's no information and also there's no minute entry in handwriting that an information was filed.

THE COURT: This is a form docket sheet?

MR. PRYOR: Yes, Your Honor.

MR. RANDALL: This is a form docket sheet.

THE COURT: Well, Mr. – –

MR. PRYOR: Pryor?

THE COURT: No, have a seat. Mr. Randall?

MR. RANDALL: Yes, sir, Your Honor.

THE COURT: It would be the thinking of this court unless there is something – – I don't doubt that the district attorney didn't do this paperwork but the record is void of an information which is essential. I had a case like this, I can't think of the name of it, out of Walker County.

Do you remember it?

THE BAILIFF: Yes, sir.

THE COURT: What's the name of it? Where the guy got life without and then they went back and Judge Brotherton, wasn't it – –

THE BAILIFF: Yes, sir. Judge Brotherton is the one that sent it back, Judge.

THE COURT: – – redid one of his prior convictions which I used – – I mean at that time but he came back later and redid it based on something and then I set it aside. But I would think that the custody of the file and all that is in the bosom of the state and not the defendant.

What would be the difference – – that has nothing to do with my ruling but I think he's entitled to relief without that information. What's the difference in the sentence?

MR. RANDALL: The difference in the sentence would be life versus life without.

THE COURT: I've heard this several times so I give you the right to appeal it, but I'm going to rule that in the absence of any affirmative showing that there was an information in this case, and especially in light of the fact that the word information is on a form, that the defendant is entitled to the relief prayed for.

MR. RANDALL: Yes, sir.

THE COURT: That will bring it to at least where y'all can do whatever y'all want to do about it.

MR. RANDALL: Yes, sir. May I mark those three documents as State's 1, 2 and 3 and enter them as part of the record?

THE COURT: Sure. Give it to her.

(Whereupon, State's Exhibits 1-3 were marked for identification.)

END OF PROCEEDINGS